89-1527

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAILWAY LABOR EXECUTIVES' ASSOCIATION
and UNITED TRANSPORTATION UNION,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION
COMPANY and DAKOTA, MINNESOTA &
EASTERN RAILROAD CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), apply to partial rail line sales and, together with *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), require a railroad to bargain with rail labor over bargaining proposals to limit the railroad's managerial prerogative to sell portions of its rail system before it sells those operations?

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Petitioners Railway Labor Executives' Association and the United Transportation Union [hereinafter, "RLEA" and "UTU," respectively][1] respectfully request that this

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[1] RLEA is a voluntary, unincorporated association of the chief executive officers of seventeen (17) labor organizations which, together with petitioner UTU, represent virtually all organized rail employees in this country. A list of RLEA's current affiliated organizations is included as Appendix I to this Petition. At the time that this action was filed in 1986, and until mid-April 1989, the UTU was affiliated with RLEA. Petitioner UTU is no longer affiliated with RLEA but it is still participating in this case.

Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *RLEA v. Chicago & Northwestern Transportation Company*, 890 F.2d 1024 (8th Cir. 1989).

OPINIONS BELOW

The opinion of the court of appeals upon remand from this Court (*see*, App. 19a) is reported at 890 F.2d 1024 and is reproduced herein at App. 1a-18a. The earlier opinion of the court of appeals, which was vacated by this Court on June 26, 1989, is reported at 848 F.2d 102 and is reproduced herein at App. 20a-24a. Earlier decisions and orders of the district court are not reported officially, but are reproduced herein at App. 25a-27a (order and oral ruling on motion for summary judgment) and at 28a-30a (order and oral ruling denying motion for preliminary injunction).

JURISDICTION

The court of appeals entered its order on remand in this case on November 29, 1989, and no party sought rehearing. On February 20, 1990, Justice Blackmun granted a request by petitioner RLEA to extend the time in which a petition may be filed to and including March 29, 1990. *RLEA, et al. v. C&NW, et al.*, Sup. Ct. No. A-580. This petition is being filed within that extended time period. *See*, 28 U.S.C. § 2101(c). Petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves primarily the proper interpretation to be given to the status quo and bargaining obligations contained in Sections 2 First and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First, 156; those statutory provisions are reproduced herein at App. 31a-32a. Several provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, are also involved in this case. Those provisions are Sections 10505 and 10901, 49 U.S.C. §§ 10505, 10901, and they are reproduced herein at App. 32a-35a.

STATEMENT OF THE CASE

This case, which is before this Court for the second time, raises important questions concerning the scope of bargaining under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the actions that a rail carrier may take during that bargaining process, where rail labor has invoked that process to bargain for an agreement to deal with the impact of a line sale on employees. These questions have plagued the rail industry since the mid-1980's when the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] decided that, contrary to its past practice, it would no longer exercise its discretion under Section 10901 of the Interstate Commerce Act, 49 U.S.C. § 10901, to require a selling carrier to provide various monetary and procedural protections for employees affected by line sales. *Compare, Durango & Silverton Narrow Gauge R.R.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *with, Ex Parte No. 392 (Sub-No. 1), Class Exemption For The Acquisition And Operation of Rail Lines Under 49 U.S.C. 10901* [hereinafter, "*Ex Parte 392*"], 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table). Indeed, this case is one of the first court cases in what has become a confused morass of litigation as rail labor has attempted to use the Railway Labor Act's bargaining process to negotiate the protections which the ICC is no longer willing to impose in line sale proceedings.

This litigation began on August 19, 1986, when RLEA filed a complaint with the United States District Court for the District of Minnesota against respondents Chicago and North Western Transportation Company and Dakota, Minnesota and Eastern Railroad [hereinafter, "C&NW" and "DM&E," respectively] to require the C&NW to bargain with rail labor both over the sale of a portion of its rail lines to the DM&E and over the notices which seven (7) of the labor organizations had served on the C&NW under Section 6 of the Railway Labor Act, 45 U.S.C.

§ 156, to devise agreements to provide the protections previously imposed by the ICC. Joint Appendix in 8th Cir. No. 87-5071 [hereinafter, "J.A."] at 4-15.[2] Rail labor also sought injunctive relief to prevent the C&NW from transferring its rail line to the DM&E until the C&NW had complied fully with its bargaining and status quo obligations under the labor statute. *Id.* Rail labor asserted that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) to enforce the commands of the Railway Labor Act. *Id.* at 6.

Respondents countered both rail labor's suit and its request for a preliminary injunction by asserting that rail labor was seeking to have the C&NW "redo its contract with DM&E to require the DM&E to agree to the very labor protection conditions that the Commission has said [in *Ex Parte 392*] are not in the public interest." J.A. at 138. According to respondents, rail labor's suit was an impermissible collateral attack on the ICC's orders exempting this sale and similar sales from regulation. J.A. at 139. Also, respondent C&NW argued, rail labor's Section 6 "notices were improper because they usurped matters within exclusive managerial prerogatives, usurped matters within the sole jurisdiction of the Interstate Commerce Commission and matters preempted by the Interstate Commerce Act and they related to matters not within the proper scope of collective bargaining agreements with the organization[s]." J.A. at 62. And finally, respondent C&NW argued that rail labor, by seeking to enjoin the sale because of the status quo obligation, was raising a dispute over what the agreements between the C&NW and rail labor "authorized," and thus, was raising a minor

[2] Those Section 6 notices asked the C&NW to enter into agreements that would require six (6) months' notice before any transfer of rail operations, require the C&NW to have any purchaser or new operator of its rail lines hire the C&NW employees affected by the sale, assume the collective bargaining agreements and, together with the C&NW, apply the standard ICC monetary and procedural protections. *See* J.A. at 42-43.

dispute over which the court had no jurisdiction. J.A. at 141.

Rail labor's request for a preliminary injunction was denied on August 27, 1986, because the district court concluded, if it granted the injunction to enjoin the sale, it "would be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." App. 29a-30a. Respondents consummated the sale and then, on January 7, 1987, the district court granted the railroads' motion for summary judgment.[3] According to the court, "[b]ecause of the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has . . . exclusive authority to modify or rescind Ex Parte No. 392." App. 27a.

Rail labor appealed that summary judgment order but on May 31, 1988, the Eighth Circuit issued a decision, with Chief Judge Lay dissenting, affirming the order, albeit for a different reason than given by the district court. According to the appellate court, the labor statute and the transportation act overlapped, and to this extent the transportation statute "supersede[d] the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements." App. 23a-24a, *quoting Burlington Northern R.R. v. UTU*, 848 F.2d 856, 862 (8th Cir. 1988).

RLEA immediately filed a petition with this Court for a writ of certiorari to review that judgment (Sup. Ct. No. 87-2049, filed June 14, 1988), and the C&NW responded by agreeing that the petition should be granted. Brief of

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[3] After the sale was consummated, rail labor modified the relief it was seeking by no longer asking that the sale be enjoined or ordered undone. Instead, rail labor asked the district court to direct the C&NW to bargain, to restore the jobs abolished, and to make the employees whole until that carrier had complied fully with its bargaining obligation.

C&NW, Sup. Ct. No. 87-2049, filed June 27, 1988. This Court, however, held this case until after it had decided *Pittsburgh & Lake Erie R.R. v. RLEA*, *supra*, and on June 26, 1989, issued an order that granted the petition and provided as follows: "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of" *Pittsburgh & Lake Erie*. App. 19a.

On remand, the appellate court asked for letter briefs and then issued its order on November 29, 1989, with Judge Magill concurring in part but dissenting in part. App. 1a. According to the appellate court, the crucial difference between this case and the *Pittsburgh & Lake Erie* case was that, here, the C&NW "so'd only a portion of its assets (826 miles of rail line and 126 miles of trackage [rights] in Sough Dakota [out of a rail system of approximately 7,000 rail miles]) to a new'y formed railway company" whereas the Pittsburgh & Lake Erie intended to sell all of its rail assets. App. 2a. "Thus," the court said, "we must decide whether the Supreme Court's decision that a railway company need not bargain with the unions with *respect to a sale of all of its assets* to another corporation applies to a case in which a railway company sells only a portion of its assets." *Id.* (emphasis in original). That question was answered as follows (*id.*):

> We believe that C&NW was not required to bargain over the sale in this case prior to the sale's completion. The sale was approved by the I.C.C., the sale was for an unprofitable, discreet section of the railway that might have been abandoned but for the sale, and after the sale C&NW would have no relationship with the purchaser. Thus, we hold that C&NW was not obligated to serve a section 156 notice on the union in connection with the proposed sale nor was it obligated to maintain the status quo and postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated.

That bargaining and status quo ruling, however, did not "end the matter," for the court then addressed the question of whether the C&NW had an obligation to bargain about the *effects* that the sale might and then did have on C&NW employees. Noting that this Court had placed a time limit on the Pittsburgh & Lake Erie's "effects bargaining" obligation, which ended when the date for closing the sale arrived, the court held that a similar limitation should not apply in a partial sale case. As the Eighth Circuit said: "Here, the selling railroad will retain the major portion of its assets and will continue to employ persons who are members of the labor organizations that are parties to this case. Thus, C&NW can bargain about the effects of the sale without delaying or upsetting the sale." App. 3a.

The court addressed the C&NW's alternative argument that the status quo issue presented a minor dispute and, with Judge Magill dissenting from this part of the decision, concluded that this case presented a major dispute. As the court stated (App. 3a-4a):

> We reject the suggestion of the C&NW and of the dissent that the dispute between the parties is a minor dispute and thus subject to arbitration. The facts here are quite close to those in P&LE, and the Supreme Court there held that the dispute was a major one and that the railroad company was obligated to bargain with the union as to the effects of the sale. The union is not seeking an interpretation of the express or implied terms of the collective bargaining agreement nor is it seeking a ruling that a past practice should be enforced. Rather, it is seeking to negotiate over the effects of a sale on those C&NW employees who are affected by it. No clear reason has been advanced by the C&NW as to why we should categorize this dispute differently.

Following that conclusion, the court held that the C&NW "is obligated to bargain with the unions with respect to the *effects* of the sale only." App. 5a (emphasis

in original). The court thereupon remanded this case "to the district court with directions that it enter an order requiring the C&NW to bargain on request of the Railway Labor Executives Association with respect to the effects of the sale on the employees of C&NW." *Id.*

Petitioners do not dispute the court of appeals' conclusion that this case presents a major dispute, for rail labor submits that the court was clearly correct in drawing that conclusion.[4] However, petitioners do dispute the Eighth Circuit's holding that the C&NW did not have to bargain over its Section 6 notices insofar as those notices may have required the C&NW to renegotiate its sale transaction. Also, petitioners dispute the court's conclusion that the C&NW could complete the sale *before* that bargaining, including bargaining over effects, was completed. This petition is addressed solely to the bargaining and status quo rulings of the court of appeals.

REASONS FOR GRANTING THE WRIT

This case brings before this Court important issues concerning the proper interpretation to be given to the Railway Labor Act's bargaining and status quo obligations, that need to be addressed by this Court in order to insure that the labor statute continues to foster stable labor relations in the rail and airline industries. This Court has previously addressed the scope of the Railway Labor Act's bargaining obligation in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), and the nature of the status quo obligation in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S.

[4] It must be noted that the Eighth Circuit has reached a conclusion on this issue that is contrary to the resolution of this classification issue as reached by the Second, Third and Seventh Circuits. *General Committee of Adjustment v. CSX R.R.*, 893 F.2d 584 (3rd Cir. 1990); *CSX Transportation, Inc. v. UTU*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, Sup. Ct. No. 89-565 (January 8, 1990); *C&NW v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988).

142 (1969), and just last term, this Court clarified its decisions in those cases when it decided *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. —— (1989). Unfortunately, the Eighth Circuit undermined both the bargaining and status quo obligations when it decided this case in a way that conflicts with *Telegraphers*, *Detroit & Toledo* and *Pittsburgh & Lake Erie*. Petitioners respectfully submit that, if the Railway Labor Act is to continue to provide a method to resolve bargaining issues without the need to threaten or to resort to strikes, this Court should review the Eighth Circuit's decision which, contrary to both the Act and the Court's earlier rulings, eliminates meaningful bargaining and requires that the threat of a strike be used to replace the bargaining leverage inherent in the Act's status quo obligation.

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW BECAUSE, UNLESS THE RAILWAY LABOR ACT'S BARGAINING AND STATUS QUO OBLIGATIONS ARE RIGIDLY ENFORCED, THE "STATUTE BECOMES WORTHLESS"

This Court has often noted that the duty imposed by Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, upon both labor and management "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes," is the *heart* of the Act. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 507, 574 (1971). Indeed, this observation is clearly borne out by an examination of the Act's language and legislative history, for in order to prevent interruptions to interstate rail commerce caused by labor strife, Congress directed both the railroads and rail employees to make *every reasonable effort* to resolve their disputes *before* those disputes rose to the level that interstate commerce was threatened. *See*, *Burlington Northern R.R. v. BMWE*, 481 U.S. 429, 444-45 (1987).

This requirement did not suddenly appear in the Railway Labor Act when it was initially enacted in 1926 (44

Stat. 577), for that Act was essentially "an industrial code for the railroads made up from the written and unwritten laws that have governed industrial relations on the railroads for many years" prior to 1926. *Hearings on S. 2646, Before Subcomm. of Senate Committee on Interstate Commerce*, 68th Cong., 1st Sess. at 16 (1924) (Statement of D. B. Robertson). One such existing "law" was *Decision No. 119* of the Railroad Labor Board, 2 R.L.B. Dec. 87 (1921), which had been created by the Transportation Act of 1920, 41 Stat. 456, but which soon proved ineffective. *See, Pennsylvania Railroad System v. Pennsylvania R.R.*, 267 U.S. 203, 215-17 (1925). In that decision, the Labor Board had promulgated certain fundamental "principles" of collective bargaining—*i.e.*, the "reasonable efforts" recommended by the 1920 Act and, subsequently, mandated by the 1926 Act. One such principle was that: "The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management." 2 R.L.B. Dec. at 96. Sections 2 First and 6 of the Railway Labor Act implement that right. *See, Hearings on S. 2646, supra*, at 201 (Statement of D. R. Richberg).

Unlike the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, in which Congress created an expert administrative agency to enforce that Act's commands, Congress created no such administrative agency to enforce the Railway Labor Act's commands, including the bargaining obligation of Section 2 First. Rather, the Act's structure provides a built-in guarantee that both parties will "exert every reasonable effort" to resolve their disputes, because an integral part of the Act's bargaining process is its status quo obligation. That obligation, as this Court stated in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969), is "central" to the Act's design. Indeed, rail labor submits, the Act's status quo feature is the essence of the Act's bargaining structure. The ability which the status quo

feature gives the party opposing the proposed change to delay its implementation, creates a very real bargaining leverage that encourages the other party to compromise in order to implement its proposal, albeit modified, as soon as possible. *Detroit & Toledo*, 396 U.S. at 150, 155. This bargaining leverage makes the threat of a strike or lock-out irrelevant to a large degree, and, as the Act's history shows, this bargaining structure has been very successful in preventing strikes or lock-outs in the rail industry. F. N. Wilner, *The Railway Labor Act: Why, What and For How Much Longer, Part II*, 57 TRANSP. PRAC. J. 129, 145 (1990).

In this case, however, the Eighth Circuit's decision nullifies much of the C&NW's bargaining obligation, for the court rejected, without any discussion, rail labor's assertion that the C&NW had an obligation to bargain over the impact on employees which its decision to sell to the DM&E would have, even though to satisfy those demands, the C&NW would have to obtain "the assent" of the DM&E. *Pittsburgh & Lake Erie R.R. v. RLEA* [hereinafter, "*P&LE*"], 491 U.S. —— (1989), slip op. at 19. Moreover, the appellate court compounded its error by ruling that the status quo obligation did not require the C&NW to refrain from selling its rail line until after it had satisfied even the limited bargaining obligation which the court concluded existed.

In short, by ruling that the C&NW had an obligation "to bargain with the unions with respect to the *effects* of the sale only" (App. 5a; emphasis in original) and that it could implement that sale *before* it completed that limited bargaining, the Eighth Circuit substantially modified the Act's major dispute resolution process: It eliminated the bargaining leverage which the Act's ability to delay created, and instead, it has required rail labor to rely upon the threat of a strike to obtain relief from the harm that occured several years ago. This makes the possibility of meaningful bargaining on the C&NW's part without further judicial intervention un-

likely, and indeed, it increases the possibility of self-help by the unions simply because that threat is their only source of bargaining leverage to "encourage" the C&NW to deal with the "effects" of this long-ago consummated sale.

This result is contrary to the Act, for as both rail management and rail labor explained to Congress in 1926 when they *jointly* proposed the legislation which became the Railway Labor Act, the *compromise* that they were asking Congress to enact was that both parties would not change the working conditions out of which the dispute arose "*until* every step in this bill had been pursued." *See, Hearings on S. 2306, Before Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. at 16 (1926) (Statement of A. P. Thom) (emphasis added). Moreover, as rail labor's spokesperson explained, the broad language used in the bill's status quo provisions was "intended to make it clear that the parties are going to wait and give the Government full opportunity to adjust the controversy." *Hearings on S. 2306, supra*, at 88-89 (Statement of D. R. Richberg). Here, the Eighth Circuit has ignored that compromise, and, consequently, it has upset the delicate balance which the Railway Labor Act crafted in 1926.

This Court has previously recognized that if "the RLA is to function as its framers intended, compliance with its mandates obviously is essential." *Burlington Northern R.R. v. BMWE*, *supra*, 481 U.S. at 445. Indeed, in *Detroit & Toledo*, this Court addressed a comparable situation where rail labor sought, as here, to bring a previously uncovered situation within the specific terms of an agreement, and stated (396 U.S. at 155; footnote omitted):

> When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at

> this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.

Whether or not the Eighth Circuit was correct in limiting both the bargaining and status quo obligations, as it did here, is important to both the rail and airline industries. *See*, 45 U.S.C. § 181. Indeed, in this period of deregulation with its increasing reliance on "price competition," both the railroads and the airlines have looked to labor costs as a means to increase their competitiveness. This, along with other factors, has led to railroads and airlines selling portions of their operations to become more cost-competitive, and this, in turn, has made the issue of exactly what does the Act's bargaining and status quo obligations require all the more troublesome, and contentious. See generally opinions concerning rehearing *en banc* in *ALPA v. Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 88-1403.

In short, all parties in the rail and airline industries need to know what their rights and obligations are under the Railway Labor Act in sale situations, for as the Third Circuit observed in *Baker v. UTU*, 455 F.2d 149, 154 (3rd Cir. 1971) (emphasis added): "If the status quo is not rigidly enforced, *the statute becomes worthless.*" Unfortunately, the Eighth Circuit's decision does not help the parties know what their rights or obligations are, because this decision is contrary to prior decisions by this Court, including its decision in *P&LE*.

II. THE EIGHTH CIRCUIT HAS DECIDED THESE IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *TELEGRAPHERS*, *DETROIT & TOLEDO* AND *P&LE*

This Court has previously addresed the Railway Labor Act's bargaining and status quo obligations, and, indeed, has done so just last term when it decided *P&LE*, an "entire line" sale case,[5] and examined its prior rulings in *Detroit & Toledo* and in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960). This case was before the Court last term, but rather than apply its rulings in *P&LE* to this partial sale case, the Court remanded this case to the Eighth Circuit for "further consideration in light" of *P&LE*. App. 19a. However, rail labor submits, when the court of appeals reconsidered this case on remand, it reached a decision on the bargaining and status quo issues that is in conflict with this Court's decisions in *Telegraphers* and *Detroit & Toledo*, for, as this Court explained in *P&LE*, those decisions should be applied to a partial line sale.

In *Telegraphers*, this Court addressed the scope of bargaining under the Railway Labor Act in a situation comparable to that presented here, where the union had served a Section 6 notice on the carrier to bargain for an

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[5] This Court's decision in *P&LE* shows that it drew a distinction between the "extreme case" involving the "decision of a carrier to quit the railroad business, sell its assets, and cease to be a railroad employer at all" (*P&LE*, slip op. at 14), and a partial line sale. *Id.* at 16 n.17 (continued). This distinction is consistent with the history of the rail industry where entire line abandonments have been accorded different treatment than partial abandonments, for even though 49 U.S.C. § 10903(b)(2) provides that "[e]ach certificate [of abandonment] shall . . . contain provisions" to protect employees, both prior to the enactment of that mandatory provision in 1976 and since, the ICC has *not* imposed employee protection in entire line abandonments, but it does in partial line abandonments. *See, RLEA v. ICC*, 735 F.2d 691, 697 (2d Cir. 1984).

agreement that would have limited the carrier's managerial right, but not contractual right, to close down certain stations and abolish agent's and telegrapher's jobs.[6] 362 U.S. at 332. Respondent C&NW's predecessor responded by contesting the validity of the union's Section 6 notice, asserting, among other reasons, that the subject matter of the notice was not bargainable because it sought to usurp the carrier's legitimate managerial prerogatives in the exercise of its business judgment. 362 U.S. at 332-33, 336. On review, this Court examined the history of bargaining under the Railway Labor Act and rejected the carrier's argument, for it concluded that it was "too late now to argue" that the union did not have the right to seek to obtain an agreement that would have limited the carrier's managerial prerogatives as the union had proposed. 362 U.S. at 338. As this Court added (362 U.S. at 339, *quoting* 45 U.S.C. § 152 First):

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the Railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions."

This Court addressed the application of *Telegraphers* to line sale cases in *P&LE* when it considered the railroads' arguments that the Court should adopt for Railway Labor Act cases the principles set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), that an employer under the NLRA did not have a mandatory duty to bargain about its decision to close *part* of its business. This Court, petitioners submit, de-

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[6] The union's Section 6 notice sought to amend the agreement to add a rule that would provide that: "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." 362 U.S. at 332. If accepted, that proposed rule would have prevented the C&NW's predecessor from closing its stations and consolidating the work of the agents and telegraphers until it reached an agreement with the union.

clined to extend *First National Maintenance* to the rail industry. *P&LE*, slip op. at 15-16 n.17. Indeed, rail labor submits, that footnote in *P&LE* shows that the "scope of mandatory bargaining under the RLA" is broader than the comparable duty under the NLRA, and that it is only in the "extreme case" where a railroad has decided to retire from the railroad business that *Telegraphers* does not apply.

P&LE's ruling on the scope of bargaining under the Railway Labor Act is also relevant to the status quo issue, for this Court's decision in *P&LE* further shows that there is a clear relationship between the duty to bargain and the identity of the working conditions that must be preserved during that bargaining. *See*, *P&LE*, slip op. at 13-14 n.15 and accompanying text. In short, *P&LE* shows that a railroad, proposing to sell a portion of its operations, has an obligation to bargain with rail labor over a Section 6 notice that extends past simply the "effects" of the sale and may require the carrier to modify its sale agreement. In other words, *Telegraphers*, when read together with *Detroit & Toledo*, as both cases were reaffirmed by *P&LE* for partial line sale cases, requires the carrier to bargain over matters that "could be satisfied only by the assent of the buyers" of the rail line being sold (*P&LE*, slip op. at 19-20), and prohibits the carrier from selling until that bargaining is completed. *Detroit & Toledo*, 396 U.S. at 155.

In this case, the Eighth Circuit, by ruling that rail labor could require the C&NW to bargain "with respect to the *effects* of the sale only" (App. 5a; emphasis in original), and that the C&NW was not "obligated to maintain the status quo and postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated" (App. 2a), effectively extended *First National Maintenance* to the Railway Labor Act. While *First National Maintenance*'s distinction between "decision bargaining" and "effects bargaining" (*see*, 452 U.S. at 681-82) may be appropriate under

a statute which does not place such a great reliance on the status quo concept as the Railway Labor Act does, the application of that bargaining dichotomy to the Railway Labor Act distorts the Act's status quo obligation and destroys its effectiveness.

Petitioners submit that the true meaning of footnote 17 of the *P&LE* decision is obvious, but the railroads and the Eighth Circuit apparently have failed to grasp this Court's meaning. Two terms ago, this Court decided that the bargaining and status quo issues merited review, but it reviewed those issues in an entire line sale case. However, entire line sales are relatively rare in the rail industry; rather, the great bulk of the cases involve partial sales. Due to the failure of the industry and lower courts to appreciate the meaning of this Court's limited holding in *P&LE*, these questions still merit review, but now in a factual situation that will put these questions to rest once and for all. As we have shown above, no one benefits from the uncertainty over the true meaning of *P&LE*'s footnote 17, and thus we urge this Court to accept this case as the vehicle to inform the rail and airline industries whether *First National Maintenance*, or *Telegraphers* and *Detroit & Toledo*, applies to partial line or asset sales.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant this writ.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

Filed: November 29, 1989

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

ORDER

On June 26, 1989, the Supreme Court granted a writ of certiorari in the above-entitled case. It then vacated

the judgment of this court and remanded the case to us for further consideration in the light of *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. ——, 109 S. Ct. 2584, 105 L.Ed.2d 415 (1989) (*P&LE*).

The court requested the parties to file letter briefs with respect to the application of *P&LE* to the instant case. After a careful review of the decision of the United States Supreme Court and the letter briefs, we revise our original opinion.

I.

There is one important difference between the facts in *P&LE* and those in this case. In P&LE, the carrier sold all of its assets to a newly formed subsidiary. Here, the Chicago and Northwestern (C&NW) sold only a portion of its assets (826 miles of rail line and 126 miles of trackage in South Dakota) to a newly formed railway company. Thus, we must decide whether the Supreme Court's decision that a railway company need not bargain with the unions with *respect to a sale of all of its assets* to another corporation applies to a case in which a railway company sells only a portion of its assets.

We believe that C&NW was not required to bargain over the sale in this case prior to the sale's completion. The sale was approved by the I.C.C., the sale was for an unprofitable, discreet section of the railway that might have been abandoned but for the sale, and after the sale C&NW would have no relationship with the purchaser. Thus, we hold that C&NW was not obligated to serve a section 156 notice on the union in connection with the proposed sale nor was it obligated to maintain the status quo and postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated.

This holding does not, however, end the matter. We also believe that *P&LE* made it clear that a railroad

selling all or a part of its assets is required to bargain about the *effects that the sale* will or might have on its employees:

> The disputed issue is whether P&LE was required to bargain about the effects that the sale would or might have upon its employees. *P&LE, in our view, was not entirely free to disregard the unions' demand that it bargain about such effects.*

P&LE, 105 L.Ed.2d at 435 (emphasis added). Moreover, C&NW can bargain about the effects of the sale even after the sale is consummated.

In *P&LE*, the Supreme Court held that the obligation to bargain over effects existed "only until the date for closing the sale arrived," which, of course, would not occur in this case until the ex parte 392 exemption became effective and the transfer occurred. We are convinced that the Supreme Court placed a time limitation on the obligation to bargain because after that date, the selling railroad would have no assets and no employees. Here, the selling railroad will retain the major portion of its assets and will continue to employ persons who are members of the labor organizations that are parties to this case. Thus, C&NW can bargain about the effects of the sale without delaying or upsetting the sale.

II.

We reject the suggestion of the C&NW and of the dissent that the dispute between the parties is a minor dispute and thus subject to arbitration. The facts here are quite close to those in *P&LE*, and the Supreme Court there held that the dispute was a major one and that the railroad company was obligated to bargain with the union as to the effects of the sale. The union is not seeking an interpretation of the express or implied terms of the collective bargaining agreement nor is it seeking a ruling that a past practice should be enforced. Rather,

it is seeking to negotiate over the effects of a sale on those C&NW employees who are affected by it. No clear reason has been advanced by the C&NW as to why we should categorize this dispute differently.

We have no quarrel with the test advanced by the dissent to determine whether a dispute is a major or a minor one. *Post* at 11. That test was approved by the United States Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 109 S. Ct. 2477, 2482, 105 L.Ed.2d 250, 264 (1989), and this court in *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986). Here, C&NW claims that the dispute over what benefits, if any, the railroad employees should receive only relates to the execution of the agreement and should be arbitrated. We disagree. This fact can be illustrated by attempting to frame the issue that would be decided by an arbitration board established under the Railway Labor Act.

C&NW suggested before the district court for the Northern District of Illinois in a case they argue is controlling, that the issue in a case such as this should be whether C&NW violated its agreements with the unions. *Chicago & Northwestern Railway v. Railway Labor Executives Ass'n*, No. 88 C 444, slip op. (N.D. Ill. Oct. 6, 1989). We disagree. Both parties concede that their agreements neither permit nor prohibit the C&NW from selling a portion of its business.

Nor should or would the issue be as formulated by the district court in that case: "what treatment, in terms of pay (severance or otherwise), seniority rights, benefit rights, transfer rights, etc., the employees of the C&NW (who are affected by the line sale) are entitled to in terms of contractual provisions and attendant past practices." *Id.* at 6. The question thus phrased would give the arbitrator a roving commission to invent terms which were never agreed to by the parties.

III.

The Supreme Court in *P&LE* has determined that disputes of this nature are major ones. In light of *P&LE*, we conclude that the C&NW is obligated to bargain with the unions with respect to the *effects* of the sale only. Bargaining should commence promptly and proceed in accordance with the provisions of the Railway Labor Act.

Under our decision the sale will stand, and the right of the C&NW to exercise its right to sell all or a part of its holding will be preserved. Thus, the unions cannot prevent the sale. As in *P&LE*, however, the railroad company will be required to bargain over the effects of the sale on its employees, thus accomplishing the intent of Congress to balance the rights of employers and workers.

We vacate our opinion of May 31, 1988 and remand to the district court with directions that it enter an order requiring the C&NW to bargain on request of the Railway Labor Executives Association with respect to the effects of the sale on the employees of C&NW.

MAGILL, Circuit Judge, concurring in part and dissenting in part.

I concur in the order except for the majority's decision that the dispute over the effects of the sale is major.[1] I dissent from that decision because the district court has not made the factual findings that would enable us to determine whether this dispute is major or minor under the standard approved by the Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989) (*Conrail*). Under that standard, the dispute is minor if C&NW's claim that the effects of the sale are authorized by the parties' agreements and past practices is "arguably justified," i.e., is neither

[1] I agree that *if* this dispute is in fact major and not minor, then C&NW must engage in effects bargaining even though the sale has been consummated.

"frivolous" nor "obviously insubstantial." *Id.* at 2482, 2485, 2489. I would remand for an initial disposition of this issue by the district court based on factual findings regarding the parties' collective bargaining agreements and attendant past practices.[2] In prior proceedings, both this court and the district court resolved this case on the basis of the supposed superseding force of the Interstate Commerce Act, and accordingly did not reach the major-minor dispute issue presented under the Railway Labor Act (RLA).[3] *See Railway Labor Executives' Ass'n v.*

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[2] This issue has clearly been preserved. C&NW moved for summary judgment on the minor dispute ground in the district court, but the case was decided in its favor on an alternate basis. C&NW then raised its minor dispute claim on the unions' appeal to this court, and raises it again on remand from the Supreme Court.

[3] The unions are obliged to seek labor protection via the RLA procedures because congressional enactment and agency rulings have all but foreclosed the availability of such protection from the Interstate Commerce Commission in short-line sales to new carriers. A background explanation is provided in *FRVR Corporation —Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification*, Finance Docket No. 31205, slip op. at 1-4 (January 28, 1988) (citations and footnotes omitted):

> Since partial deregulation under the Staggers Rail Act of 1980 nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.
>
> Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local car-

Chicago & Northwestern Transp. Co., 848 F.2d 102 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3207 (1989) (mem.).

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riers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute. In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection. By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individuals applications on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay. The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances. [*Ex Parte No. 392* (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under*

The majority completely ignores the absence of the requisite factual findings and, as a consequence of their absence, only purports to apply the *Conrail* standard without actually doing so. By reaching its decision on the major-minor dispute issue in this manner, the majority in essence creates a per se rule whereby disputes over the effects of short-line sales are major as a matter of law, irrespective of a claim that the effects are sanctioned by agreements and past practices. Clearly, nothin *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) (*P&LE*), even be-

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49 U.S.C. 10901, 1 I.C.C.2d 810 (1986), *review denied sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).]

The Commission's policy has been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved. Most observers supported and welcomed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown. The Commission's authority includes the power to impose labor protective conditions through partial revocation, although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.

gins to suggest such a rule exempting these disputes from the analysis required by *Conrail*.

The majority's decision that the unions' request for effects bargaining presents a major dispute is premised on the view that "[t]he facts here are quite close to those in *P&LE*." *Ante* at 3. However, *P&LE* must be distinguished insofar as the railroad there did not assert that the effects of the sale were authorized by existing agreements and past practices.[4] Without such a claim, the *Conrail* standard is obviously inapplicable. Indeed, if the railroad does not make a contractual justification claim in response to a union request for effects bargaining, there can be little doubt that the dispute in question is major. *See Conrail*, 109 S. Ct. at 2481 (line between major and minor disputes "looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take

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[4] The district court in *P&LE* stated that "[t]here appears to be little argument that the dispute at hand [over effects of the sale] constitutes a 'major' dispute." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 677 F. Supp. 830, 835 (W.D. Pa. 1987), *aff'd*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989). As the Seventh Circuit has observed, "there is no indication in the analysis by the Third Circuit in *P&LE* that it considered the effect of a claim by a rail carrier employer that its actions pertaining to the employees whose jobs were to be abolished by the proposed sale were sanctioned by and proper under the collective bargaining agreements between the carrier and the unions representing its employees." *Chicago & North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1286 n.3 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988). The Supreme Court likewise did not mention a contractual justification claim and its perfunctory analysis appeared to take it as uncontested that the dispute over effects was major. *See P&LE*, 109 S. Ct. at 2597. Certainly, nothing in the Court's opinion suggests or implies that all short-line sales automatically require effects bargaining regardless of a claim that the effects of the sale are authorized by agreements and past practices. There is simply no basis for the majority's categorical assertion that "[t]he Supreme Court in *P&LE* has determined that disputes of this nature are major ones." *Ante* at 5.

the disputed action"). In contrast to *P&LE*, in this case C&NW claims that job abolishments and other effects of the short-line sale are authorized by its existing agreements with the unions and attendant past practices. Specifically, C&NW contends tht the force-reduction provisions of the collective bargaining agreements give it the right to abolish jobs for any reason whatever upon providing the notice prescribed by the agreements. C&NW emphasizes its further contention that this interpretation of the agreements is confirmed by past practices regarding job abolishments in its over 5000 miles of abandonments since 1968. It is well established that longstanding past practices not only shed light on the meaning of express terms of collective bargaining agreements, but can themselves ripen into implied terms of the agreements. *See, e.g., Conrail*, 109 S. Ct. 2485 (noting that "collective-bargaining agreements may include implied as well as express terms" and that "the parties' 'practice, usage and custom' is of significance in interpreting their agreement"). Because of C&NW's contractual justification claim, and in particular its heavy reliance on past practices, it is necessary to remand for factual findings to which the *Conrail* standard can be applied. Contrary to the import of the majority's holding, *P&LE* cannot be read to render the dispute here major as a matter of law.

The majority's position violates the fundamental principle that "factfinding is the basic responsibility of district courts, rather than appellate courts." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). It is elementary that when the district court has failed to make essential factual findings, the appropriate course is "a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). More specifically, remand in this case is called for by our previous cases addressing the proper course for de-

ciding whether a dispute is major or minor. That decision "turns upon the facts in each case" and "involves first a determination of factual issues, and then conclutions of law based on those findings." *Missouri Pacific Joint Protective Bd. v. Missouri Pac. R.R.*, 730 F.2d 533, 537 (8th Cir. 1984) (citation omitted). The crucial factual issues are the content of the parties' collective bargaining agreements and the nature and extent of past practices. *See Alton & Southern Lodge No. 306 v. Alton & Southern Ry.*, 849 F.2d 1111, 1114 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 3214 (1989). The district court's findings as to these factual issues may be reversed only if clearly erroneous. *Id.* Whether a dispute is major or minor based on those findings is a question of law which we review *de novo*. *International Ass'n of Machinists v. Soo Line R.R.*, 850 F.2d 368, 374 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989). By dispensing with the underlying factual findings necessary for an informed and justifiable resolution of the major-minor dispute question, the majority departs from our established practice and strips the district court of its fact-finding role.

We should instead follow the path taken in *Missouri Pacific*, 730 F.2d 533, where we were presented with a situation virtually identical to that before us now. In that case, "the basic issue" was "whether the dispute is minor or major." *Id.* at 536. As here, the district court received some evidence on the issue but "did not inquire into whether the dispute involved is major or minor and made no factual findings in this regard." *Id.* We realized that "[i]n this posture the only way we could reverse and order [the relief sought by the appellant union] would be to decide as a matter of law that the dispute involved is a major one." *Id.* However, we could not reach such a decision because the railroad claimed that established past practices justified its actions, and we recognized that "[i]n determining whether the dis-

pute is major or minor the factual issues of [the railroad's] past practices and its operational changes are closely intertwined with the legal conclusions regarding the scope of the agreements between the parties." *Id.* at 537. Accordingly, we remanded the case, acknowledging that "the determination of whether the dispute is major or minor is, in the first instance, an issue for the district court to decide." *Id.* The majority provides no reason why remand is not equally necessary in the instant case. In particular, it does not explain how it can purport to apply the *Conrail* standard when the district court has made no factual findings on the major-minor dispute issue.

In *Conrail*, decided two days before *P&LE*, the Supreme Court held that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute in major." 109 S. Ct. at 2482. This court applied the same standard prior to its approval by the Supreme Court. In *Soo Line*, we stated that "[i]f the parties disagree whether the dispute can be resolved by reference to an agreement, the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" 850 F.2d at 376 (quoting First and Seventh Circuit decisions). Contractual justification imposes only a "light burden" on the railroad. *Conrail*, 109 S. Ct. at 2489. Accordingly, when in doubt, courts will construe disputes as minor.[5] *Soo Line*, 850 F.2d at 377.

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[5] The railroad's light burden of persuasion is necessary to protect the National Railroad Adjustment Board's exclusive jurisdiction over minor disputes. *Soo Line*, 850 F.2d at 377. Minor disputes are resolved by compulsory and binding arbitration before the Board, or before other adjustment boards upon which the railroad and the unions agree. 45 U.S.C. § 153 (1982). In *Conrail*,

I am unwilling to assume, as the majority effectively does, that factual findings by the district court would inevitably reveal that C&NW is unable to meet the light burden of establishing its contractual justification claim is neither frivolous nor obviously insubstantial. Recent decisions by the Second and Seventh Circuits have held that disputes over the effects of short-line partial sales were minor because in each case the railroad's contractual justification claim satisfied this standard. *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990,

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the Supreme Court emphasized that making full use of the Board (or other adjustment boards) is important because it "help[s] to 'maintain agreements,' by assuring that collective-bargaining contracts are enforced by arbitrators who are experts in 'the common law of [the] particular industry'"; it also "will assure that the risks of selfhelp are not needlessly undertaken, and will aid '[t]he peaceable settlement of labor controversies.'" 109 S. Ct. at 2484 (quoting Supreme Court decisions).

If a dispute is major, the RLA requires the parties to undergo a "virtually endless" process of bargaining and mediation. *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987). Failure of the process "frees the parties to employ a broad range of economic selfhelp." *Conrail*, 109 S. Ct. at 2484. The Supreme Court described the major dispute procedures in *P&LE*:

> The parties must confer, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its service *sua sponte* if it finds a labor emergency to exist. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. If arbitration is rejected and the dispute threatens "substantially to interrupt intersetate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*.

109 S. Ct. at 2589 n.4 (citations omitted) (quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969)).

998-99 (2d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-565); *Chicago & North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1283-86 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988).[6] The district court in *C&NW* reaffirmed the holding in that case after reexamining it in light of *P&LE* and *Conrail*, noting that *Conrail* adopted the same standard used by the Seventh Circuit and specifically rejecting the unions' argument that *P&LE* required an opposite result. No. 88 C 444, slip op. (N.D. Ill. Oct. 6, 1989). The relevance of the *C&NW* case is increased by C&NW's assertion that it involved not only the same parties, but also the same agreements, past practices and contractual justification claim as the instant case. After a careful evaluation, the Seventh Circuit held that the dispute in *C&NW* was minor because:

> There can be no doubt that the agreements and past practice arising thereunder embrace matters of job abolishment, layoff and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line sale who are able to retain their employment with C & NW. In addition, C & NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have a least some factual support.

855 F.2d at 1284. In *CSX*, 879 F.2d at 1001, the Second Circuit observed that *C&NW* "addressed a fact situation almost identical to that presented here." The decisions in *CSX* and especially *C&NW* make it clear that, at a mini-

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[6] It is worth noting that the circuit courts in *CSX* and *C&NW* did not address the major-minor dispute issue in the first instance as the majority does here. Rather, in each case the circuit court affirmed a district court determination that the dispute was minor. *CSX*, 879 F.2d at 1002; *C&NW*, 855 F.2d at 1286.

mum, C&NW's claim warrants serious consideration and should not be disposed of in the summary fashion chosen by the majority in complete disregard of the lack of necessary factual findings.

After concluding "*P&LE* made it clear that a railroad selling all or a part of its assets is required to bargain" over effects of the sale, *ante* at 2, the majority attempts to bolster its position by finding that the unions' section 6 notices [7] proposing new agreements to provide employee protection themselves render the dispute major. *Ante* at 3. The majority fails to recognize that if C&NW's contractual justification claim satisfies the *Conrail* standard, then the unions' section 6 notices proposing new agreements to cover employees affected by the sale could not transform the situation into a major dispute. *CSX*, 879 F.2d at 1000-01; *see also Airline Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891, 900 (D.C. Cir. 1988) (rejecting unions' "suggestion that the mere serving of § 6 bargaining notices changes the nature of the dispute"); *Missouri Pacific*, 730 F.2d at 536 n.3 ("The serving of a section 6 notice is not determinative of whether the controversy involved is major or minor."). The unions in both *CSX*, 879 F.2d at 998, 1000, and *C&NW*, 855 F.2d at 1280, 1284, also served notices seeking new agreements to govern the effects of the short-line sales, but that did not change the minor disputes into major ones. As the Second Circuit observed in *CSX*, 879 F.2d at 1001, if existing agreements governed the abolishment of jobs in connection with the line sale, "rights which [the unions] might seek to obtain by bargaining for future agreements would manifestly be irrelevant to that controversy." *See also Air Line Pilots*, 863 F.2d at 900 ("a rule that allows a party to characterize all disputes as 'major' through a unilateral action such as serving § 6 notices on the other party is unwise and contrary to the two-track procedure of the RLA").

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[7] Section 6 of the RLA, 45 U.S.C. § 156 (1982).

The majority ultimately concedes that the *Conrail* standard is controlling, *ante* at 4, but then avoids actually applying it, which is not surprising since this concession cannot be reconciled with the majority's later reiteration of its view that "*P&LE* has determined that disputes of this nature are major ones." *Ante* at 5. The majority cannot have it both ways. Either *P&LE* makes the dispute over effects major as a matter of law or the *Conrail* standard must be applied to determine whether the dispute is major or minor. That the majority is unwilling to take the latter position, and unable to do so without remanding for factual findings, is evidenced by its utterly inadequate "analysis" of C&NW's contractual justification claim. It merely states that it disagrees with the claim without providing any explanation whatsoever as to how (or even whether) it determined that C&NW cannot meet the light burden of establishing the claim is neither frivolous nor obviously insubstantial. This silence speaks volumes for it confirms that no such explanation can be provided because the district court has not made the requisite factual findings. Furthermore, by declaring that it disagrees with C&NW's claim, the majority oversteps the bounds of the courts' limited role under the RLA and usurps the function of the National Railroad Adjustment Board (NRAB). *Conrail* emphatically reaffirmed the well-established rule that "under the RLA, it is not the role of the courts to decide the merits of the parties' dispute." 109 S. Ct. at 2488. Rather, the courts' role is confined to determining whether a contractual claim is "arguably justified." *Id.* at 2488-89.

In an effort to justify its failure to apply the correct legal standard, the majority attempts to show that the dispute is major by illustrating how a proper issue for arbitration could not be framed. *Ante* at 4. Neither of the two points the majority makes using this curious approach supports its position. First, the undisputed fact that the parties' agreements neither permitted nor prohibited the sale itself is certainly relevant in determin-

ing whether C&NW was obligated to bargain over its *decision to sell*, *see P&LE*, 109 S. Ct. at 2592-93, 2596, but it says nothing about whether C&NW's contractual justification claim regarding the *effects of the sale* is either frivolous or obviously insubstantial. Indeed, the parties in *CSX* and *C&NW* likewise never contended there were any agreements permitting or prohibiting the short-line sales. Second, the issue for arbitration defined by the district court in *C&NW*, quoted *ante* at 4, which the majority says would be improper in this case, simply called for the NRAB to interpret existing express and implied agreements and then apply them to employees affected by the short-line sale.[8] Such an arbitration issue would be proper in the instant case if the dispute over effects is minor, as it was in *C&NW*. It obviously would be improper if the dispute is major, in which case the dispute would not even be subject to arbitration. The majority rejects the arbitration issue in *C&NW* as improper without first having actually applied the *Conrail* standard to determine whether the dispute is major (or explaining why the Seventh Circuit's decision in *C&NW* was incorrect). The majority thus rejects the possibility of framing a proper issue for arbitration in this case by positing the existence of a major dispute. Such circular reasoning is hardly persuasive. More importantly, one is left wondering how the majority can profess to know that a particular arbitration issue "would give the arbitrator a roving commission to invent terms which were never agreed to by the parties," *ante* at 4, when the district court has made no factual findings regarding the parties' express and implied agreements.

Even assuming the dispute over effects is major, the majority errs by exceeding the contours of *P&LE*'s direction that certain union demands are excluded from

[8] The district court in *C&NW* noted that "[t]his issue for arbitration is essentially the issue [previously] presented by C&NW to the NRAB" after the Seventh Circuit had held the dispute was minor. No. 88 C 444, slip op. at 6 (N.D. Ill. Oct. 6, 1989).

effects bargaining. *P&LE* makes it clear that C&NW is not obligated to bargain about union demands that can only be satisfied by the purchasing railroad, the Dakota, Minnesota & Eastern Railroad (DM&E),[9] because such demands seek to change or dictate the terms of the sale, and thus in effect challenge the decision to sell itself. 109 S. Ct. at 2597. Although the majority correctly holds that C&NW was not required to bargain over the decision to sell, it fails to exclude from effects bargaining those matters which can only be implemented by the buyer. The unions contend that such matters are bargainable here, Appellant's Letter Brief at 13, and include in their demands for labor protection a proposal that DM&E assume the applicable C&NW agreements. *Id.* at 18 n.9; Appellant's Brief at 9. Demands such as this are excluded from effects bargaining under *P&LE*.

I express no opinion as to whether the dispute over effects is major or minor.[10] I simply contend that this issue involves as yet undetermined facts essential to application of the controlling *Conrail* standard, and that we should therefore follow the course taken in *Missouri Pacific* by remanding for an initial disposition of the issue by the district court based on factual findings regarding the content of the parties' agreements and the nature and extent of attendant past practices. For these purposes, an additional record may be necessary.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[9] The short-line sale to DM&E was consummated on September 4, 1986. DM&E has owned and operated the line since that time.

[10] Contrary to the majority's characterization of my position, *see ante* at 3, I am not suggesting that the dispute over effects is minor. The majority seems to assume that we must resolve this issue one way or the other even though the present posture of this case does not allow us to do so.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

No. 87-2049

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*

June 26, 1989

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association, 491 U.S. —— (1989).

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae / Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 18, 1987

Filed: May 31, 1988

Before LAY, Chief Judge, and HEANEY and MAGILL, Circuit Judges.

HEANEY, Circuit Judge.

In this appeal, the Railway Labor Executives' Association (RLEA) asks the Court to reverse the decision of the United States District Court for the District of Minnesota. The district court refused to enjoin the sale of a section of trackage by the Chicago & Northwestern Transportation Company (C&NW) to the Dakota, Minnesota & Eastern Railroad (DM&E) until C&NW exhausted the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA). Because we find the RLA in this circumstance superseded by the authority of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (ICA), we affirm the district court.

C&NW had sought for many years to divest itself of certain marginal or light density rail lines in South Dakota. Normally, the sale or abandonment of rail lines is subject to the approval of the Interstate Commerce Commission (ICC). *See* 49 U.S.C. § 10901, 10903, 10905. The ICC had in the past refused to allow C&NW to rid itself of these rail lines because of the adverse impact of such action on the State of South Dakota.

In January, 1986, the ICC, in an ex parte rulemaking procedure, exempted as a class the sale of rail lines to "new carriers" from the prior approval requirements of the ICA. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Following this change in ICC policy, C&NW agreed on July 2, 1986, to sell 826 miles of its rail lines and assign 139 miles of its South Dakota trackage to DM&E, a newly formed railroad.

Beginning in May of 1986, when they learned of the railroad's intention to sell, seven of the unions representing C&NW employees served notices on the C&NW as required under Section 6 of the RLA, 45 U.S.C. § 156.

These notices informed C&NW of the unions' intention to negotiate agreements to require both advance notification of any proposed transfer of rail lines and appropriate employee protective conditions. The unions further sought to obtain a pledge by C&NW to require DM&E to employ C&NW employees, to assume C&NW's collective bargaining obligations, and to apply appropriate employee protective arrangements. Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).

While the parties engaged in discussions, C&NW continued with its plans to sell the South Dakota lines. Pursuant to this goal, both the C&NW and the DM&E filed verified notices with the ICC under *Ex Parte No. 392* to qualify for exemption from prior approval requirements. Once it became apparent that C&NW intended to consummate the sale, notwithstanding the fact that it had not complied with the mandatory bargaining requirements of the RLA, RLEA, an umbrella organization made up of representatives of the various rail unions representing C&NW employees, filed a complaint in the United States District Court for the District of Minnesota on August 19, 1986. In its complaint, RLEA sought a declaratory judgment that C&NW had an obligation under the RLA both to bargain over the proposed transfer and to maintain the status quo until that bargaining was concluded. RLEA also sought interlocutory and then permanent injunctive relief requiring C&NW to bargain and maintain the status quo. C&NW replied that the mandatory bargaining requirements of the RLA were preempted by the provisions of the ICA governing sales and labor protective conditions.

On August 27, 1987, the district court denied RLEA's motion for a preliminary injunction, declaring such re-

lief would "be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." Shortly after that ruling, C&NW and DM&E consummated the sale, and on September 5, 1987, DM&E began operating over its newly acquired trackage. Once the sale was consummated, RLEA concentrated its attack on C&NW's bargaining obligation and duty to maintain the employment status quo of its employees whom RLEA asserted were improperly affected. Both sides moved for summary judgment. On January 7, 1987, the district court orally denied RLEA's motion, again finding that the ICC's action in *Ex Parte No. 392* would be undermined if the provisions of the RLA were enforced and C&NW was required to bargain with the railroad unions. This appeal followed.

In *Burlington Northern R.R. v. United Transp. Union*, No. 87-2851, slip op. (8th Cir. May 31, 1988), a case decided today involving a similar railroad transaction exempted under *Ex Parte No. 392* from normal ICC approval requirements, we held that the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA. Specifically, we stated:

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping

process designed to reach labor protective agreements.

Id. at 12.

The RLEA's claim would require us to invoke the mandatory bargaining provisions of the RLA. Because in the present circumstances these provisions are superseded by the ICA, we affirm the decision of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. I cannot agree that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982) (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. The ICA focuses on national transportation policy. *See* 49 U.S.C. § 10101a. Although the interest of labor may be asserted in proceedings before the Interstate Commerce Commission (ICC), I agree with the Third Circuit's view that it is highly unlikely "that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. at 56 (3d Cir. Apr. 8, 1988). It is clear to me that the ICC lacks expertise in the field of labor security. I respectfully conclude that Congress did not intend to include labor protective conditions within the ICC proceedings so as to supersede labor's protective mechanisms under the Railway Labor Act.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-738

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA and EASTERN RAILROAD CORPORATION,
Defendants.

ORDER

Before the Court are defendants' motions for summary judgment and plaintiff's cross-motion for summary judgment. William J. Birney, Esq. appeared for plaintiff. Ralph J. Moore, Esq. appeared for defendant Chicage and Northwestern Transportation Company. Robert J. Corber, Esq. appeared for defendant Dakota, Minnesota and Eastern Railroad Corporation.

Based on the briefs and arguments of counsel and the entire file, IT IS HEREBY ORDERED that plaintiff's motion is denied and defendants' motions for summary judgment are granted.

Dated: January 8, 1987.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86 Civ 738

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

CHICAGO and NORTHWESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

TRANSCRIPT EXCERPT
ORAL RULING AND ORDER OF DISTRICT COURT
GRANTING RESPONDENTS' MOTION FOR
SUMMARY JUDGMENT

Wednesday, January 7, 1987
St. Paul Minnesota

* * * *

[18] THE COURT [Renner, J.] I have no questions. I am ready to rule, thank you.

This case is going to depend upon whether 392 in its present form applies or sinks. That's going to require decisions by courts higher than this one. But to this Court, a reading of Ex Parte 392 demonstrates that the ICC felt that it [19] is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. And the decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by Ex Parte 392.

As the Court interprets 392, the ICC intended that sales of marginal lines be facilitated. Otherwise, if they weren't being facilitated, it was the ICC's position they were going to be abandoned, and it affirmatively exercised its discretion not to impose employee protection on this class of transaction, believing that such conditions would discourage acquisition of marginal lines and disserve the public interest.

The ICC did, however, establish a procedure for those "extraordinary" cases where the imposition of protections may be appropriate, whereby a labor union may seek to revoke the blanket exemption by petition in a particular case pursuant to 49 USC, Section 10505(d). Frankly, I see no case law supporting plaintiff's distinction between the ICC's approval or authorization of a short line sale and an ICC exemption from regulation which permits the sale to go forward. An exemption to the Court is no different than an authorization. A sale cannot go forward without one or the other.

I realize that the DC circuit opinion could stand as authority to the contrary. We will have to wait and see. It's very possible and maybe probable that the parties will see fit to appeal this Court's order and get a ruling in the Eighth [20] Circuit, so that everyone would better understand the law as it's going to be committed to posterity.

Because of the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has, as you know, exclusive authority to modify or rescind Ex Parte No. 392. So I am going to deny the plaintiff's motion cross-motion for summary judgment and grant the defendants' motion for summary judgment.

Are there any questions,

MR. MOORE [Counsel for C&NW]: No, Your Honor.

THE COURT: There being none, the matter will be deemed terminated.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-738

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

CHICAGO and NORTH WESTERN TRANSPORTATION, COMPANY and DAKOTA, MINNESOTA and EASTERN RAILROAD,
Defendants.

ORDER

Before the court is plaintiff's motion for a preliminary injunction. William J. Birney, Esq. appeared for plaintiff. Ralph J. Moore, Esq. appeared for defendant Chicago and North Western Transportation Company. Robert J. Corber, Esq. appeared for defendant Dakota, Minnesota and Eastern Railroad. Richard A. Allen, Esq. submitted a memorandum as amicus curiae for the State of South Dakota.

Based on the briefs and arguments of counsel, the record and the entire file, IT IS HEREBY ORDERED that plaintiff's motion is denied.

August 27, 1986.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ 3-86-738

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY
and DAKOTA, MINNESOTA and
EASTERN RAILROAD CORPORATION,
Defendants.

TRANSCRIPT EXCERPT
ORAL RULING AND ORDER OF DISTRICT COURT
DENYING PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION

Judge Renner
August 27, 1986
St. Paul, Minnesota

* * * *

[42] THE COURT [Renner, J.]: I am prepared to rule, rightly or wrongly, and I admit that it's an area that hasn't been chartered by a lot of the legal decisions which would be of any he'p. But I have pondered over the affect of the decision that I shall be rendering and I am convinced that if I were to grant the preliminary injunction, I would be clearly at loggerheads with the

decision of the ICC, particularly as expressed in Ex Parte 392. It does seem to me, rightly or wrongly, the matter will ultimately, I am sure, be resolved on appeal, whether this case or any case, that the ICC has assumed jurisdiction in this area, even where it might perhaps seemingly conflict with the Railway Act. I am going to deny the motion.

I am denying it also based upon my resolution of the other three aspects of Dataphase. I just feel that the threat [43] of irreparable injury—and I am impressed with the argument that really we are talking about 19 employees, and that they can be traced, the balancing of the equities and the public interest, and I am impressed with the demonstration of the interest as expressed in the amicus brief and with the assurances that rehabilitation to a line which is only the second railway operating in South Dakota, that I am safer and more likely doing justice by denying the application for preliminary injunction than were I to issue it.

That will be all.

* * * *

APPENDIX H

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board,

unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

III. Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or services is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obliga-

tion to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be en-

hanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

APPENDIX I

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers and Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Seafarers' International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America; and

Transportation • Communications Union (TCU).

No. 89-1611

In The

Supreme Court of the United States

October Term, 1989

TIMOTHY SCOTT REESE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the search of a jacket found on a chair in an apartment, belonging to a visitor (petitioner) to the apartment, was included within the scope for a warrant to search the apartment for drugs and other contraband?

TABLE OF CONTENTS

TABLE OF CITATIONS

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No. 89-1611

In The

Supreme Court of the United States

October Term, 1989

TIMOTHY SCOTT REESE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Commonwealth of Pennsylvania respectfully prays that petitioner Timothy Scott Reese's request that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania, which became final on January 5, 1990 be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person's or things to be seized.

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

COUNTERSTATEMENT OF THE CASE

On or about March 22, 1985, members of the Pennsylvania State Police, Drug Law Enforcement Division, obtained a search warrant for 93 Main Street, Apt. D in Luzerne, Pennsylvania. The warrant authorized the search of the premises and of the person of one Tina Cosgrove, the known resident of the apartment. The warrant further authorized a search for cocaine and any and all controlled substances and any drug paraphernalia. The search warrant and affidavit also stated that petitioner Timothy Scott Reese, was an associate of Cosgrove, had been observed in the apartment and had been a target of drug law enforcement investigations.[1]

---

1. The affidavit of probable cause stated in relevant part as follows:
(Cont'd)

Upon entering the apartment, the officers read the warrant to Mrs. Cosgrove and undertook the search. Present in the apartment beside Mrs. Cosgrove were her three (3) children and two (2) adults, Jerome Dunbar and petitioner. Petitioner Reese was in the kitchen while Dunbar was in the living room.

During the course of the search, which uncovered a quantity of controlled substances, Officer Carl Allen, who was assigned to watch Cosgrove and petitioner, observed a black leather jacket draped over a kitchen chair located approximately four (4) feet away from him. Without knowing who the jacket belonged to but suspecting that it contained contraband, Trooper Allen searched the black leather jacket and discovered metal knuckles in the coat pocket. Petitioner acknowledged ownership of the jacket and subsequently, was arrested and charged with the possession of "brass knuckles," a prohibited offense under the Crimes Code. 18 Pa.C.S.A Subsection 908 (Purdons, 1983). Upon leaving the apartment after his arrest, petitioner voluntarily took and wore the jacket from which the knuckles were removed.

HOW THE FEDERAL QUESTION WAS PRESENTED

Respondent Commonwealth of Pennsylvania concurs in the summary regarding presentation of the federal question as set forth in Petitioner's Petition for Writ of Certiorari, page 5.

(Cont'd)

1. According to Confidential Informant, one Timothy Reese, an associate of Cosgrove has been observed in Apt. D at the 93 Main Street address. Reese is a known drug user and has been the target of law enforcement investigations of the Region VIII Strike Force at Kingston.

REASONS FOR DENYING THE WRIT

I.

The decision of the court below is compatible with decisions and principles of the United States Supreme Court.

The petitioner has advanced the argument that there is no constitutional difference between the search of a visitor's person and the search of a visitor's personal effects located on the premises where a search warrant is being executed and that, therefore, the decision of the Pennsylvania Supreme Court which allowed police to extend a search warrant to include the personal effects of a visitor to the premises is violative of prior decisions and principles of the Supreme Court of the United States.

The Fourth Amendment of the United States Constitution which has been held applicable not only to the federal government but also to the state under the due process clause of the Fourteenth Amendment directs that, "no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched and the persons or things to be seized." United States Constitution, Amendment IV. The Pennsylvania Constitution, further requires that "no warrant to search a place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause." Pennsylvania Constitution, Article 1, Subsection 8. The objective of the particularity requirement is to protect the citizenry from general warrants giving the bearer an unlimited authority to search and seize. *Wolfe v. Colorado,* 338 U.S. 25, 27-28, 69 S. Ct. 1359, 1361, 98 L. Ed. 1782. Indeed, in *Maryland v. Garrison,* 480 U.S. ____, 107 S. Ct. 1013, 1017, 94 L. Ed. 2d 72, 80 (1987), this Court found that this "requirement ensures that the search will be carefully tailored will not take on the character of the wide-ranging

exploratory searches the Framers [of the Constitution] intended to prohibit."

In *United States v. Ross*, 456 U.S. 798, 820-821 (1982), furthermore, this Court noted that where a search warrant adequately describes the place to be searched and the persons and/or things to be seized, the scope of the search "extends to the entire area in which the object of the search may be found", and properly includes the opening and inspection of containers and other receptacles where the object may be secreted. In addition, the *Ross* Court observed as follows:

> [T]o search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a foot locker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search.

Id. at 821-822.

This Court further discussed the scope of a lawful search in *Maryland v. Garrison*, 480 U.S. ____, 108 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), *citing United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). The Court in *Ross* stated that the purview of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." The Court further illustrated this concept as follows:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not

for a preliminary injunction, C&NW and DM&E consummated the sale on September 4, 1986, and DM&E commenced operations on the line the next day (J.A. 189-90). The district court later granted summary judgment for the railroads (App. 26a-27a), and the Eighth Circuit affirmed, holding that the ICA "supersedes" whatever bargaining and status quo obligations C&NW might otherwise have with respect to the sale (App. 20a).[4] On June 26, 1989, this Court granted certiorari, vacated the Eighth Circuit's judgment, and remanded the case for further consideration in light of *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Ass'n*, 491 U.S. ——, 109 S. Ct. 2584 (1989) ("*P&LE*"). 109 S. Ct. 3207 (1989) (reprinted at App. 19a).

In *P&LE*, this Court held that a railroad's decision to sell all its rail lines, abolish all its railroad jobs, and leave the railroad business is a matter of management prerogative. Accordingly, such a railroad does not have an obligation under the RLA to bargain about the decision to sell or to postpone consummation of the sale in order to maintain the status quo. 109 S. Ct. at 2595-96. The Court further held that, if a union gives appropriate notice under § 6 of the RLA, such a carrier is obligated to bargain about the effects that the sale will have on its employees, but that obligation does not require the carrier to bargain about terms it has already negotiated

---

[4] C&NW had raised two other alternative defenses to RLEA's action, each based solely on the RLA, not the ICA: (1) the decision to sell the line was a matter of managerial prerogative as to which the C&NW had no bargaining, and hence no status quo, obligations under the RLA; and (2) even if C&NW was obligated to bargain over the unions' demands for new agreements limiting C&NW's right to sell the line, C&NW's existing agreements at least arguably permitted its actions regarding its employees in connection with the sale (principally the abolishment of jobs), and so RLEA's status quo claim presented a "minor dispute" over the application and interpretation of agreements subject to mandatory arbitration under § 3 of the RLA, 45 U.S.C. § 153. Because the district court and the court of appeals (in its first opinion) decided the case on ICA grounds, neither court reached these issues.

with the purchaser or matters that would require the assent of the purchaser, does not require the carrier to bargain after the sale is closed and the company ceases to be a "carrier" subject to the RLA, and does not require postponement of the sale. *Id.* at 2595-96, 2597.

The Eighth Circuit requested letter briefs from the parties on the application of *P&LE* to this case, and on November 29, 1989, issued an order which "revise[d] [its] original opinion" (App. 2a). The court noted that it "must decide whether the Supreme Court's decision [in *P&LE*] that a railway company need not bargain with the unions with *respect to a sale of all of its assets* to another corporation applies to a case in which a railway company sells only a portion of its assets." (*Id.* (emphasis original).) The court held that, under *P&LE*, "C&NW was not required to bargain over the sale in this case prior to the sale's completion * * * nor was it obligated to maintain the status quo and postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated." (*Id.*) The court further held that, by virtue of the unions' notices and under *P&LE*, C&NW "is obligated to bargain with the unions with respect to the *effects* of the sale" on its employees (App. 5a (emphasis original)), and that, unlike the selling railroad in *P&LE*, which was leaving the railroad business, C&NW must bargain about these effects even after consummation of the sale (App. 3a). The court therefore vacated its original opinion and remanded the case to the district court "with directions that it enter an order requiring the C&NW to bargain on request of the Railway Labor Executives Association with respect to the effects of the sale on the employees of C&NW." (App. 5a.)[5]

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[5] Petitioners state that the Eighth Circuit on remand correctly rejected C&NW's alternative argument that the status quo claim was a minor dispute, and suggest in a footnote that this ruling put the Eighth Circuit in conflict with three other circuits. See Pet. at 7 & 8 n.4. The Eighth Circuit did not so hold. Rather, the court held only that the unions' § 6 notices proposing new labor protec-

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below does not conflict with decisions of the other courts of appeals or of this Court so as to warrant this Court's plenary review. The decision below is the only one by any court of appeals to determine whether the Court's decision in *P&LE* applies to a railroad's sale of part of its lines. In the absence of any conflict among the lower courts on the bargaining and status quo obligations in such cases, there is no basis for claiming that this Court needs to "put these questions to rest" (Pet. 17).

Moreover, the decision below is entirely consistent with *P&LE*, as well as the Court's earlier decisions in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330 (1960) (*"Telegraphers"*) and *Detroit & Toledo Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142 (1969) (*"Shore Line"*), upon which petitioners rely. In *P&LE*, this Court held that *Telegraphers* did not require a rail carrier to bargain about a decision to sell all its lines and abolish all its rail employees' jobs, and that *Shore*

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tions gave rise to a major dispute over those proposed changes to existing agreements (App. 3a-4a). Since the court also held that C&NW had no status quo obligation with respect to the sale, because the sale was within its managerial prerogative, the court had no occasion to reach C&NW's alternative argument that any such status quo claim would necessarily turn on the application of C&NW's existing agreements and thus raise a minor dispute. By contrast, in the three decisions that petitioners cite, other circuits held that the status quo claims presented a minor dispute over the carriers' rights under existing labor agreements. See *General Comm. of Adjustment* v. *CSX R.R.*, 893 F.2d 584, 589-93 (3d Cir. 1990); *CSX Transp., Inc.* v. *United Transp. Union*, 879 F.2d 990, 998-1002 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *Chicago & N. W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1283-86 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988). There is no inconsistency between a holding that a controversy between a carrier and a union over the adoption of a proposed *new* agreement is a major dispute, as in this case, and a holding that a status quo controversy over the interpretation and application of *existing* agreements is a minor dispute, as in the cases cited by petitioners.

Line did not require such a carrier to postpone the sale in order to preserve the status quo pending the completion of any bargaining obligations it had arising out of the sale. The same result should be reached in this case. Like the decision of the carrier in *P&LE* to leave the railroad business altogether, and the decision of the employer in *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), to terminate a part of its business, C&NW's decision to sell this line and thus close a part of its business was a matter of managerial prerogative. Accordingly, C&NW was not required to bargain over its decision to sell, the terms of the sale, or union proposals that would require the assent of DM&E, and C&NW was not required to postpone the sale or the abolishment of jobs until it satisfied any other bargaining obligations it might have arising out of the sale.

ARGUMENT

The petition contends that the Court should review the bargaining and status quo issues in this case in order to resolve "uncertainty" about the application of *P&LE* to a railroad's sale of part of its lines (Pet. 17). No conflicts have arisen among the lower courts, however, with respect to the question whether *P&LE*'s bargaining and status quo holdings apply to partial line sales. Indeed, the decision below is the only one by a court of appeals since *P&LE* to determine the bargaining and status quo obligations in a partial line sale case. Unless a divergence on these questions develops in the courts of appeals, there will be no need for further review by this Court.

Moreover, the decision below is fully consistent with the decisions of this Court, including *P&LE*, and does not conflict with any decisions of this Court about the bargaining and status quo obligations in partial line sale cases. In *P&LE*, this Court squarely held that the RLA does not require a rail carrier to bargain over its decision to sell its entire system, since that is a matter of man-

agerial prerogative, and that the RLA does not require such a carrier to bargain over union demands that would change the terms of sale or require the assent of the buyer, since such demands in effect challenge the decision to sell. 109 S. Ct. at 2593-97. The Court also held that the RLA's status quo provisions do not require such a carrier to postpone the sale until it has satisfied any duty it may have to bargain over union notices about the effects of the sale on its employees. *Id.* at 2595-97. Thus, "the decision of a railroad employer to go out of business and consequently reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of [§ 6 of the RLA]." *Id.* at 2596. The Court in *P&LE* principally relied upon the doctrine it had developed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, that an employer's economic decision to close its business, *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965), or part of its business, *First National Maintenance*, 452 U.S. at 686, is a matter of managerial prerogative and not a mandatory subject of bargaining. See 109 S. Ct. at 2595 & n.17.

Although the court below followed each of these holdings in *P&LE*, petitioners contend nonetheless that it erred, because this Court somehow "explained" and "reaffirmed" in *P&LE* that the bargaining and status quo obligations of carriers in partial line sale cases are governed not by *P&LE*, but by the Court's earlier decisions in *Telegraphers* and *Shore Line* (Pet. 14, 16). According to petitioners, those two earlier cases, read in light of *P&LE*, show that a railroad's decision to cease operating a part of its business is a mandatory subject of bargaining under the RLA and cannot be implemented until the Act's major-dispute procedures are exhausted.

But that conclusion is not supported by those three cases. *Telegraphers* and *Shore Line* themselves do not purport to establish a rule governing the bargaining and status quo obligations for partial lines sales. Both of

those cases involved a change in operations along a carrier's existing lines, not a decision to shut down or sell one of its lines and thus close down part of its business. In *Telegraphers*, the railroad had proposed to consolidate or close some of its little-used railroad stations along some of its lines, thus necessarily reducing the number of jobs on those lines while continuing to do business on them. This Court held that the RLA required the railroad to bargain over a union notice that sought an agreement preventing the railroad from abolishing any union member's position without the union's consent. 362 U.S. at 338-41. In *Shore Line*, this Court held that the RLA's status quo provisions prohibited a railroad from changing the long-established location at which some of its employees began and ended their daily work. Even though the location of work assignments was not covered by the parties's existing express and implied collective agreements, the Court held that the status quo provisions of the Act applied, because that location was part of the "actual, objective working conditions" out of which the dispute arose. 396 U.S. at 153. Nothing in either case suggests that their holdings apply to a carrier's more fundamental decision to sell part of its lines and thus shut down part of its business.

Indeed, the Court's treatment of those cases in *P&LE* confirms that they do not apply to this case. In *P&LE*, RLEA argued that under *Telegraphers* and *Shore Line* a railroad was required to bargain over its decision to sell all its lines and had to fulfill that bargaining obligation before making the sale. The Court distinguished both cases, however, and refused to extend either of them to a case in which a railroad seeks to sell its lines and leave the railroad business. 109 S. Ct. at 2594-95 & n.17. "The dissent * * * seems to assert that *Shore Line* and *Telegraphers* dealt with a railroad's freedom to leave the market. But as we point out, that is precisely what those cases did not involve." *Id.* at 2595 n.17. For this reason, neither *Telegraphers* nor *Shore Line* required

C&NW to postpone and bargain over its decision to leave the market served by the Winona-Rapid City line.

Petitioners nevertheless assert that the decision below was in error, and that C&NW was required to bargain over its decision to sell in this case, because *P&LE* "declined to extend *First National Maintenance* to the rail industry" (Pet. 15-16). In *First National Maintenance*, this Court held that the decision to shut down a part of a business is a matter of managerial prerogative under the NLRA. 452 U.S. at 686. Nowhere in *P&LE*, however, did the Court address the application of its analysis in *First National Maintenance* to a case under the RLA. See 109 S. Ct. at 2595 n.17. In holding that a railroad's decision to sell all its lines is a matter of managerial prerogative and not a mandatory subject of bargaining under the RLA, the Court in *P&LE* relied principally upon its holding in *Darlington*, which *First National Maintenance* "reaffirmed," that an employer's decision to close a business is not a mandatory subject of bargaining under the NLRA. 109 S. Ct. at 2595 & n.17. The Court in *P&LE* did not further delimit the scope of mandatory bargaining under the RLA, and thus had no occasion to suggest that its analysis in *First National Maintenance* would not apply to partial line sales governed by the RLA.

In fact, the reasons the Court gave in *First National Maintenance* for concluding that the NLRA does not require an employer to bargain over its decision to close down part of its business apply under the RLA as well. The Court noted in *First National Maintenance* that an employer's decision to close down part of its business "involv[es] a change in the scope and direction of the enterprise" and "is akin to the decision whether to be in business at all." 452 U.S. at 677. That such a decision may result in the elimination of jobs did not mean the employer had to bargain over it: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable busi-

ness. * * * [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 678-79. The Court then held that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision," and thus such a decision is not a mandatory subject of bargaining. *Id.* at 686. A railroad, no less than any other employer, needs the freedom to determine, without collective bargaining, the "scope and direction of [its] enterprise." No decision of this Court is to the contrary.[6]

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[6] Petitioners contend that footnote 17 of *P&LE* shows that the scope of mandatory bargaining is broader under the RLA than under the NLRA and extends to a partial line sale (Pet. 16). In this respect, however, *P&LE* refers only to *First National Maintenance*, 452 U.S. at 686 n.23, where the Court distinguished *Telegraphers* (in part because the scope of mandatory bargaining under the RLA is not "coextensive with" the NLRA) but, since the case before it arose under the NLRA, did not purport to determine the scope of the duty to bargain under the RLA.

In fact, the statutory language and legislative history suggest that the duty to bargain is narrower under the RLA than the NLRA. Section 6 of the RLA requires a carrier to bargain over "working conditions," and petitioners contend in this case that continued employment on the line was one of the "working conditions" over which C&NW was obligated to bargain. But that term is not as broad on its face as the otherwise similar term in §§ 8(a)(5) and (d) of the NLRA, 29 U.S.C. §§ 158(a)(5) & 158(d), which mandate bargaining with respect to "terms and conditions of employment." Justice Stewart, concurring in *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203, 217 (1964), observed that "[i]n common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment," *id.* at 222, but that the term is "susceptible

Petitioners further assert that, under *P&LE*, *Telegraphers*, and *Shore Line*, C&NW was obliged to bargain over the unions' demands that C&NW require D&ME to hire former C&NW employees and afford them the labor protections typically imposed by the ICC in rail mergers, demands which would have required C&NW to renegotiate its sales agreement and obtain the assent of DM&E (Pet. 16-17). The unions' notices in this case were not served before the terms of sale were settled, however, so that C&NW might be required somehow to incorporate the unions' proposals into its offer to D&ME. Thus, under the rule established in *P&LE*, C&NW was not obliged to bargain over union demands to the extent that they "could be satisfied only by the assent of the

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of diverse interpretaitons" and had been more broadly construed by the National Labor Relations Board ("NLRB") and the courts in reviewing its decisions, *id.* at 221-22. In rejecting a contention that "the term 'conditions of employment' has no broader meaning than that perhaps spontaneously suggested by the term 'working conditions,' and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn," the NLRB noted that Senator Wagner (sponsor of the NLRA) had stated in debates on amendments thereto, "that the term 'condition of employment' as used in the original Act was intended to have a broader meaning than 'working conditions' * * * (93 Congressional Record 3427)." *Inland Steel Co.*, 77 N.L.R.B. 1, 7, *enforced*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950). In enforcing that decision, the Seventh Circuit made a similar observation:

> "A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. * * * Congress in the instant legislation used the phrase 'other conditions of employment,' instead of the phrase 'working conditions,' which it had used previously in the Railway Labor Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 254-55 (1948), *aff'd sub nom. American Communications Ass'n* v. *Doud*, 339 U.S. 382 (1950).

buyers," because such demands "sought to change or dictate the terms of the sale, and in effect challenged the decision to sell itself." *P&LE*, 109 S. Ct. at 2597. *P&LE* does not suggest that a railroad's decision to sell part of its lines should be treated any differently. *Telegraphers* and *Shore Line*, as already noted, did not involve line sales, and thus do not control here.

Finally, petitioners ignore this Court's admonition in *P&LE* that courts should be chary of construing the RLA so as to create conflict between that Act and the ICA. 109 S. Ct. at 2596-97. Petitioners argue that, notwithstanding the ICC's approval of this line sale, its consummation violated the RLA. Were that the rule, however, the two statutes would be brought into direct conflict every time a union serves a § 6 notice with respect to a partial line sale. Under the ICA, line sales to new carriers such as DM&E are authorized because they serve the public interest.[7] If the RLA prohibits, on the basis of the interests of employees, what the ICA authorizes as a matter of public interest, then the Court cannot "harmonize" the two statutes and " 'give effect to each,' " as the Court recognized in *P&LE* it should attempt to do, 109 S. Ct. at 2596, 2597. Adopting petitioners' construction of the RLA for partial line sales would compel the federal courts to reach the statutory accommodation issue. The decision below wisely avoided that course.

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[7] See *Ex Parte No. 392*, 1 I.C.C.2d at 812-15, 817.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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